Supreme Court, U.S.
FILED
OCT 1 02

No. 02-409

In The
Supreme Court of the United States

ALLAN J. FAVISH,

Petitioner,

v.

OFFICE OF INDEPENDENT COUNSEL,
SHEILA FOSTER ANTHONY,
LISA FOSTER MOODY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS, SHEILA FOSTER ANTHONY AND LISA FOSTER MOODY, IN OPPOSITION

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QUESTION PRESENTED

Whether surviving family members have a privacy interest, protected under Exemption 7(C) of the Freedom of Information Act, in photographs taken by law enforcement officers of their loved one's body at the scene of his suicide.

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BRIEF FOR RESPONDENTS
SHEILA FOSTER ANTHONY AND
LISA FOSTER MOODY
IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals on the first appeal (Pet. App. 16a) are reported at Favish v. Office of Independent Counsel, 217 F.3d 1168 (9th Cir. 2000). The order of the court of appeals on the second appeal (Pet. App. 56a) is unreported.[1] The order of the court of appeals denying petitions for rehearing, including the dissent of Judge Pregerson (Pet. App. 58a), is unreported. The opinions of the district court (Pet. App. 1a, 53a) are unreported.

JURISDICTIONAL STATEMENT

The court of appeals entered its judgment on June 20, 2002. The court entered an order denying a timely petition for rehearing on August 16, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] Petitioner's appendix omits the dissent of Judge Pregerson in the second appeal, which is reproduced in the appendix to the petition for certiorari in this case being filed by Sheila Foster Anthony and Lisa Foster Moody.

STATUTE INVOLVED

The Freedom of Information Act ("FOIA") provides that:

> (b) This section does not apply to matters that are
>
> * * *
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information
>
> * * *
>
> (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy.

5 U.S.C. § 552(b).

STATEMENT OF THE CASE

1. Vincent W. Foster, Jr., was Deputy White House Counsel under President Clinton. Mr. Foster was found dead in Fort Marcy Park, a national park in northern Virginia, on July 20, 1993. The National Park Service and the FBI conducted investigations into his death, and later inquiries were performed by separate committees of the Senate and House of Representatives. Two separate investigations into his death also were conducted by the Office of Independent Counsel, under Robert B. Fiske, Jr., and Kenneth W. Starr, respectively. See Favish, 217 F.3d at 1178-81, Pet. App. 34a-39a (Pregerson, J. dissenting) (summarizing investigations). The latter inquiry took place over three years and involved "interviews with more than thirty witnesses and analysis of hundreds of documents, forensic reports, the physical evidence, and death-scene and

autopsy photographs." Id. at 1180, Pet. App. 38a. All these investigations independently concluded that Mr. Foster committed suicide by a self-inflicted gunshot wound.

Plaintiff, a lawyer and conspiracy theorist, is unpersuaded and asserts that the numerous professional investigators and public officials who have studied Mr. Foster's death are guilty of wrongful conduct. In 1997, Plaintiff made a request under FOIA for copies of 150 photographs compiled during the investigations. Following litigation (and plaintiff's withdrawal of his request for 21 photographs), he now possesses copies of 119 of the photographs identified in his original request. Id. at 1170-71, Pet. App. 18a. Also, he has been granted access to an abundance of other investigative materials that provide great detail about Mr. Foster's death and the subsequent investigations into it, including extensive, detailed information concerning the gunshot wound that caused Mr. Foster's death.

The ten remaining photographs, which were taken shortly after Mr. Foster's body was discovered, depict his corpse lying in Fort Marcy Park. Mr. Foster's widow and sister intervened in this case because they believe that release of these photographs would constitute a severe and unnecessary invasion of their family's privacy. By invading their memory of a loved one, by subjecting them to harassment from any number of media outlets, and by leaving them vulnerable to the unwitting viewing of profoundly traumatic images, the disclosure of these photographs clearly would implicate a privacy interest of their family. Id. at 1182-83, Pet. App. 42a-43a (dissenting opinion of Pregerson, J., quoting declaration of Sheila Foster Anthony). Disclosure of these photographs is precluded by 5 U.S.C. § 552(b)(7)(C), which permits government agencies to deny the release of investigatory materials where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

2. Plaintiff also participated as counsel in a FOIA suit in the District of Columbia brought by an organization seeking photographs of Foster's body at the death scene and the autopsy, including the same photographs at issue here.[2] The D.C. Circuit held that the spouse, parents and children of the deceased have a privacy interest against release of photographs of his body at the death scene. Accuracy in Media, Inc. v. Nat'l Park Serv., 194 F.3d 120, 123 (D.C. Cir. 1999). The D.C. Circuit also affirmed the district court's ruling that plaintiff had not shown a sufficient public interest in disclosure to outweigh the Foster family's privacy interest. Id. at 124-25.

3. Plaintiff brought this action in the Central District of California against the Office of Independent Counsel ("OIC"), seeking numerous photographs relating to Mr. Foster's suicide. The district court ordered disclosure of some photographs, but refused disclosure of photographs of the death scene that showed Mr. Foster's body or face. The court held that the compelling privacy interest implicated by these photographs outweighed any public interest in their disclosure. Pet. App. 1a.

Plaintiff appealed, arguing that Foster's survivors had no privacy interest in the death scene photographs. The Ninth Circuit rejected that argument, holding "that the personal privacy in the statutory exemption extends to the memory of the deceased held by those tied closely to the deceased by blood or love and therefore that the expectable invasion of their privacy caused by the release of records made for law enforcement must be balanced against the public purpose to be served by disclosure." Favish, 217 F.3d at 1173, Pet. App. 24a. However, the panel reversed and remanded, directing the district court to examine the photographs in camera to weigh the privacy interests of the

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[2] The D.C. Circuit case involved black-and-white copies of the photographs. The present case involves color Polaroid originals. Favish, 217 F.3d at 1177, Pet. App. 32a.

Foster family against the claimed public interest in disclosure. Id. at 1174, Pet. App. 25a. Judge Pregerson dissented, on the ground that the Vaughn index was sufficient to demonstrate that nine of the photographs implicate a privacy interest that outweighs any interest that the public possesses in their release. Id. at 1174-87, Pet. App. 25a-52a.

4. On remand, the district court, observing that the panel decision limited the Foster family's privacy interest to "graphic, explicit, and extremely upsetting" material, concluded that five of the photographs fit this description and therefore were precluded from disclosure under FOIA Exemption 7(C). 5 U.S.C. § 552(b)(7)(C). However, it granted disclosure with respect to the remaining five photographs that it found did not meet this test. Pet. App. 53a.

Sheila Foster Anthony and Lisa Foster Moody then intervened as defendants, submitted additional declarations in support of their motion for reconsideration and, when that motion was denied, joined in the OIC's appeal. Plaintiff also appealed.

After in camera review of the photographs, the panel summarily affirmed the district court's judgment, except as to one of the photographs that the district court had ordered released, which the panel concluded should be withheld. Pet. App. 57a. Judge Pregerson dissented to the release of the remaining four photographs.

ARGUMENT

The decision of the court of appeals correctly recognized that surviving family members have a privacy interest in the personal details of a loved one's death. The only other court of appeals to address the issue came to the same conclusion. Accuracy in Media, 194 F.3d at 123. The decision of the court of appeals also accords with district court decisions that recognized the privacy interest of the

surviving families in the autopsy photos and x-rays of President Kennedy's body and the tapes recording the final words of the astronauts who died in the explosion of the spaceship Challenger. Katz v. Nat'l Archives & Records Admin., 862 F.Supp. 476 (D.D.C. 1994), aff'd on other grounds, 68 F.3d 1438 (D.C. Cir. 1995); New York Times Co. v. NASA, 782 F.Supp. 628, 631 (D.D.C. 1991).

Petitioner argues that privacy extends only to personal information about oneself, citing this Court's statement that "privacy encompass[es] the individual's control of information concerning his or her person." United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989). However, Reporters Committee did not address the issue of survivors' rights. The legislative history of FOIA indicates that the privacy exemptions were intended to protect government files containing "intimate details" of a "highly personal" nature. Getman v. NLRB, 450 F.2d 670, 675 (D.C. Cir. 1971). The moments surrounding death are "intimate details" of a "highly personal" nature not only for the deceased, but also for his close family. As the Accuracy in Media, Kennedy autopsy and Challenger cases illustrate and the court below correctly recognized, there is a "zone of privacy in which a spouse, a parent, a child, a brother or a sister preserves the memory of the deceased loved one." Favish, 217 F.3d at 1173, Pet. App. 24a.

The decision below was clearly correct in recognizing that the surviving family members have a privacy interest in the personal details of their loved one's death that qualifies for protection under FOIA Exemption 7(C).[3] On this issue, there is no conflict among the Circuits

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[3] The surviving family members believe that the court of appeals, by releasing some of the death scene photos that the court deemed not to be sufficiently graphic, explicit, and extremely upsetting, erroneously decided three important issues as to which there is a circuit conflict. Accordingly, they are filing a petition for certiorari challenging aspects of the decision below.

or with any decision of this Court, and the petition for certiorari should be denied.[4]

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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[4] Petitioner also argues that the court of appeals erred by failing to consider partial redaction of the photographs. Petitioner does not allege any conflict among the Circuits or with any decision of this Court on this issue. In any event, the feasibility of redaction is a fact-bound issue that is not appropriate for certiorari.